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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. .....

LAMBROS G. METRAKOS,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD CO. (Dismissed Below), THE CLEVELAND UNION TERMINALS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the said Court, *Lambros G. Metrakos v. New York Central Railroad Co.* (Dismissed Below), *The Cleveland Union Terminals Company,* on June 17, 1954.

OPINIONS BELOW.

No opinions below.

JURISDICTION.

The judgment of the Court of Appeals was entered April 8, 1954, petition for rehearing filed April 21, 1954, and denied on June 17, 1954. The jurisdiction is invoked under 28 U. S. C. A. § 1254(1): that there is a question of Federal law, to-wit: the construction and application of the Federal Employers' Liability Act, as to what charge must be given on burden of proof in cases under such

Act in the District Courts of the United States, which question has not been, but should be, settled by this Court.

QUESTION PRESENTED.

I. Is it error for a trial Judge in an action in the United States District Court for the Northern District of Ohio, Eastern Division, under the Federal Employers' Liability Act to charge the jury that the petitioner must prove his cause of action to the satisfaction of the jury?

STATUTE INVOLVED.

Title 45, Sec. 51, Federal Code Annotated:

RAILROADS.

"Chapter 2. Liability for Injuries to Employees. Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, * * * works * * * or other equipment."

STATEMENT.

The petitioner, a car cleaner, sued his employer, The Cleveland Union Terminals Company, under the Federal Employers' Liability Act for serious injuries suffered in the course of his duty in a railroad car.

While removing a water tank, his foot slipped on the soapy, littered floor, with the result that he suffered a rupture of discs of the vertebrae, causing him permanent injuries and impairing his ability to earn.

The jury brought in a verdict for the defendant which was caused by the overburdensome charge to the jury. The Court of Appeals affirmed. An adequate statement of the facts is below contained.

In the record are the Complaint and the Answer on which issue was made. The case was tried to a jury which returned a verdict for the defendant. Motion for new trial was filed, overruled and the appeal to Court of Appeals was perfected.

THE FACTS.

The plaintiff, then 24 years of age, was in the employ of The Cleveland Union Terminals Company on February 19, 1949. At that time he was assigned to a job known as Temporary Car Cleaner and had been in that category for a short time prior to the date of his injury. His general duties concerned themselves with icing and watering water coolers in coaches.

At about 6: 00 P. M., on the day of injury, his foreman peremptorily ordered him to do a special job on a New York Central mail car. He was given the car number and told that a mail car water tank was contaminated; that he should remove it, steam it and change it.

Plaintiff then went to this particular car to the point where the water cooler tank was located at the end of the car adjoining a wall which separated the water tank from a moveable wash basin, as shown by exhibits. This water tank was between 31 inches and 36 inches high and it rested on a metal stand with a flange, the bottom of said stand being 3 feet from the floor. This water tank did not have any handles on it whatsoever and it was made of galvanized sheet metal.

The way it was set into the stand made it very difficult to remove because it rested in an inset of the stand.

The plaintiff had never before removed a tank of this kind and had never been informed of its weight. Owing to the condition of the spigot of the tank the water could not be drained and the plaintiff was compelled to try to remove the tank in its condition. As he started to lift it out of the stand and against his shoulder, his foot slipped and he went to a crouched position with the tank and so incurred the injury described below. He fell to his right knee with the tank resting on one corner of the floor, he holding on to the tank with his arms and body (C. R. 8a).

The plaintiff, after the occurrence, observed the presence of soapy water on the floor and the presence of orange peels and debris (C. R. 8a).

Though he had a pain in his lower right back as a result, he did some more work, but owing to sharp pains and inability to straighten up, obtained assistance and then went to the office to tell the foreman that he could not bend down and was in pain (C. R. 9a).

He then went home, received some assistance from his wife, and on arising discovered he could not move either leg without pain and could not get out of bed without his wife's help (C. R. 9a). He then went, the next day, with his wife to Lutheran Hospital and after getting back from the hospital and on the same day, called his family physician, who gave him some injections and prescribed a homemade belt and advised him not to walk or overexert himself (C. R. 10a). The day was the 20th of February, 1949.

He was unable to do any work for over two months, and then was examined by the railroad doctor (C. R. 10a).

The diagnosis of Dr. Wolkin, a specialist, as well as myelogram x-rays (C. R. 13a, 16a), showed a rupture of the disk between the 4th and 5th lumbar vertebrae and also of the disk between the 5th lumbar and sacrum.

It was testified by the doctors that the final result of a herniated disk, as the condition is called, is a restricted back movement and severe attacks of pain with no assurance of recovery or ability to work as before.

Before the injury the plaintiff earned $4,800.00 a year with an hourly rate of $1.03 and the rate in 1952 was $1.57 an hour, and he had an expectancy of 40.21 years.

The answer of respondent admitted that petitioner may have sustained injury to his spine in lifting while at work but denied negligence (C. R. 7a). There was an issue as to negligence—the jury found for defendant. We claim the court's charge was too burdensome.

This Statement is given so the prejudicial effect of the errors charged by the petitioner will appear.

REASONS FOR GRANTING THE WRIT.

1. Construction of Federal Employers Liability Act.

The statute under which the action was brought was Title 45, Sec. 51, Federal Code Annotated, creating a liability of laws for injuries to employees, which reads as follows:

RAILROADS.

"Chapter 2. Liability for Injuries to Employees. Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, * * * works * * * or other equipment."

This statute does not describe the burden of proof of the injured employee. As far as we are able to determine, the terms of the instruction as to burden of proof have never been laid down by any Federal Court. In the case at bar the trial Judge charged the jury that the plaintiff must prove the negligence of the defendant to the satisfaction of the jury by a preponderance of the evidence. Quoting from the charge of the Court, C. R. 22a:

> "The Court. Now, before you arrive at a verdict in this case you will proceed to examine whether or not the plaintiff has established to your satisfaction by a preponderance or the over-weight of the evidence that the defendant was negligent in the respects claimed or contended for by the plaintiff or in any one of the respects claimed or contended for by the plaintiff."

The United States Court of Appeals, affirming the District Court, was of the opinion that the charge was proper.

We deny the charge was proper because an instruction that the jury had to be satisfied that defendant was negligent was placing a greater burden on the plaintiff than is normally required in a civil case.

An examination of several definitions of the word "satisfy" or "satisfaction" shows why this is so.

Ballentine's Law Dictionary with Pronunciations defines "satisfaction of the jury" as follows:

> "To prove a thing to the satisfaction of a jury means that the jury must be satisfied that the thing existed. To satisfy the mind, according to the common notion of mankind, is to free it from doubt, to set it at rest. This is the primary meaning of the word, according to all the lexicographers, when used in this connection. To accomplish this result—to 'satisfy' a body of men of the truth of a disputed fact—requires much more than a preponderance of the evidence. Clear and con-

vincing evidence must be adduced in its favor." See *Kelch v. State,* 55 O. S. 146.

Webster's New Twentieth Century Dictionary of the English Language Unabridged has this definition of the word "satisfy":

"To free from doubt, suspense or uncertainty; to give full assurance to; to set at rest the mind of; to convince; as to satisfy oneself by inquiry."

The charge given in the case at bar is also contrary to the spirit of the Federal Employers' Liability Act as it has been interpreted by this Court. The Court has attempted to give to this Act an interpretation consistent with the maximum opportunity for recovery by the injured workman. For example, there is the case of *Wilkerson v. McCarthy,* 336 U. S. 53. In that case the employee sued for injuries suffered as a result of stepping on a board which was slippery and greasy so that he fell into a pit. Justice Black there said (page 55):

"This court has previously held in many cases that where jury trials are required, courts must submit the issue of negligence to a jury if *evidence might justify* a finding either way on those issues. * * * It was because of the importance of preserving for litigants in F. E. L. A. cases their right to a jury trial that we granted certiorari in this case."

See also *Lavender, Admr. v. Kurn, et al.,* 327 U. S. 645, where a switch tender was killed in the switchyard, it was claimed, when he was caught by a mail hook end swinging out. There were no eye witnesses. The Court said, on page 653:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of specula-

> tion and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference * * * jury is free to discard or disbelieve whatever facts are inconsistent. * * *"

The reference to speculation and conjecture clearly indicates that the Supreme Court recognizes a jury must deal with probabilities, and certainly, if a jury is dealing with probabilities and must unite to arrive at a verdict, then a charge requiring that the jury be satisfied by a preponderance of the evidence defeats the liberal and remedial purpose of the Act, and places a greater handicap on the petitioner than was intended by Congress.

The trial Court in the case at bar, by charging as he did, deprived the petitioner of his full rights under the Federal Employers' Liability Act.

There have, as yet, been no decisions by the Supreme Court of the United States defining this point. Also there has been no prior opinion handed down by any Circuit Court of Appeals on this question.

We, therefore, urge this Court to allow this petition for writ of certiorari so that a standard be set up for all future F. E. L. A. cases tried in Federal Courts.

While there have been no federal opinions on this question, there are numerous state Court decisions which have reversed judgments where the trial Court charged that the jury had to be satisfied by a preponderance of the evidence.

We respectfully direct the Court's attention to the following cases, making particular reference to the decisions of the Ohio Supreme Court.

The Supreme Court of the State of Ohio declared in *The Cincinnati, Hamilton & Dayton Railway Company v. Frye,* 80 O. St. 289, Syl. 2, which was an action by an em-

ployee of a railroad for injuries resulting from the derailment of a locomotive, that he was entitled to an instruction merely requiring the jury to find the issue from the probabilities; that it was error to charge that the jury must be satisfied by a preponderance of the evidence.

We list below other Ohio cases and decisions from high Courts in other States which express themselves on the unfairness of any other rule than that of probabilities where a railroad employee is suing under the Federal Employers' Liability Act.

The Federal Employers' Liability Act is a remedy made available to injured workmen in all of the 48 States. It is important, therefore, that a standard of burden of proof be determined by the Federal Courts to apply to all litigation arising out of the Act wherever such litigation be tried in the Federal Courts. Until now no such uniform rule has been laid down by the highest Court of the land.

OTHER RELEVANT DECISIONS.

The court in the above cited case of *Cincinnati, Hamilton & Dayton Railway Company vs. Frye,* 80 O. S. 289, states in its opinion:

> "* * * In Davis v. Guarnieri, 45 Ohio St. 471, this court, in the eighth paragraph of the syllabus, declares the law to be that: 'In the trial of a civil action where the preponderance of the proof is to determine the issues, the court or jury deals simply with the probabilities in the case.' And in the opinion, at page 490, Owen, C. J., says: 'It is not necessary to the determination of the issues, in a civil case (with very few exceptions, of which the present is not one), that the triers should believe the existence of any material fact, but that the probabilities, when weighed by them, preponderate in favor of the fact which they find to be established by the proof. * * *' "

The principle of that case is followed to this day, but we give only one of the number of the later cases.

See *Kuhn v. Banker,* 133 O. St. 304, where the Court says:

"The jury deals with probabilities and it is for the jury in weighing the evidence where the probability lies."

An error as to burden of proof requires a reversal because of the plain injustice of a charge which places a greater burden than the plaintiff was required to sustain under the law, and the Courts have set aside verdicts obtained under an improper charge as to burden of proof.

Heacock v. Baule, Supreme Court, Iowa, 245 N. W. 753, 754 (1932).

Headnote 4:

"Instruction to finding preponderance of evidence as testimony which best satisfies jury's minds it is true *held* erroneous because of word 'satisfies,' plaintiff being merely required to prove case by preponderance of evidence."

Page 754:

"In civil cases a fact may be found in accordance with the preponderance of the evidence, and yet the mind may be left in doubt as to the very truth. The triers of an issue in such cases should, when doubts arise, find for the side whereon the doubts have less weight. (Quoting Bryan v. Chicago, R. I. & P. Ry. Co., 63 Iowa, 464, 19 N. W. 295.)"

"* * * The jurors' minds might not be 'satisfied' with the truth of the evidence on either side of a case, yet the law requires that they shall weigh both sides and the side on which the weight of the evidence preponderates is entitled to the finding. * * * this is the rule in civil cases. * * *"

A later opinion corrects an error in an entry and to the benefit of the plaintiff.

Perrett v. Southern Pacific Co., 73 Cal. App. (2) 30, 165 P. 2nd 751, 756.

> "There is another instruction that was clearly erroneous. At the request of the defendant the jury was instructed that the defendant could be held liable only 'upon proof which satisfies your mind that the plaintiff's injuries were proximately caused by some negligence upon its part.' Of course, in a civil case the degree of proof is preponderance of the evidence and not proof to the satisfaction of the jury."

SPECIFICATIONS OF ERRORS TO BE URGED.

1. In holding that the charge of the trial Judge as to burden of proof was proper, though it required proof by the petitioner to the satisfaction of the jury;

2. In affirming the judgment of the District Court.

CONCLUSION.

It is plain that though the trial Court submitted to a jury the issue of negligence causing injury to an employee of the railroad from slipping and other causes in a railroad car, it nevertheless interfered with the jury's function by not allowing the jury, under the charge, to determine the issue of negligence from mere probabilities. A charge that the jury must be satisfied can only mean beyond a doubt, and if the jury is required to overcome a doubt before it can give relief to an injured railroad man, then, we submit, that few will have the opportunity to recover under the policy and purpose of Congress as announced in the Federal Employers' Liability Act.

Before his injury Lambros G. Metrakos earned $4,800.00 a year, and it may be asked how did it come about that this hardworking man received no award from his injuries?

Although the issue on injury was contested, it was only as to degree, because the respondent in its answer admitted the petitioner suffered back injury while lifting. However the issue on negligence was sharply contested.

A contest always raises doubt and uncertainty. The trial judge then instructed the jury in language as defined by Webster to mean freedom from doubt or uncertainty. Thus the jury was not allowed to weigh probabilities or decide the issue of negligence on preponderance—they being human and subject to doubts raised by the contest could not find for the petitioner under an instruction which said in essence—unless you are free from doubt or uncertainty as to the issue of respondent's negligence—you must find for the respondent.

This analysis of the effect of an instruction which requires the jury to be free from doubt clearly points up the prejudicial effect and danger to the rights of all injured railroad workers who in the future may have occasion to ask for relief under the Act in the Federal Courts.

We urge this Honorable Court to allow this writ of certiorari so that a fair standard on burden of proof be established for all cases brought under the Act in the federal district courts.

Respectfully submitted,

WILLIAM J. CORRIGAN,

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THEODORE T. SINDELL,

Of Counsel.

APPENDIX.

Judgment of the United States Court of Appeals for the Sixth Circuit, and Order Denying Rehearing.

JUDGMENT.

(Filed April 8, 1954.)

Upon consideration of the briefs and record in the above cause and the oral argument of the counsel therein, and perceiving no prejudicial error at the trial below, either preserved by timely objections at the trial or otherwise appearing, and the cause having been fairly submitted to the jury with a verdict for the defendant of no cause of action being by it returned,

IT IS HEREBY ORDERED that the judgment below be and it is hereby

Affirmed.

ORDER DENYING REHEARING.

(Filed June 17, 1954.)

Upon consideration of a petition for rehearing in the above entitled cause, it is hereby ordered that the petition be and it is hereby

Denied.